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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Communications Assistance for	)	CC Docket No. 97-213
Law Enforcement Act	)	

To: The Commission

REPLY COMMENTS OF CINGULAR WIRELESS LLC

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SUMMARY

The record in this proceeding demonstrates that the Commission may not impose the four punch list capabilities on telecommunications carriers. The J-Standard definition of call-identifying information is consistent with CALEA's statutory language and legislative history, and *not* deficient. Moreover, none of the four punch list items involves the provision of call-identifying information and, in any event, the punch list items are consistent with the statutory prerequisites of reasonable availability, cost-effectiveness, minimizing the effect on residential ratepayers, and protecting privacy. The punch list items fail to meet these requirements as well.

The DOJ/FBI interpretation of CALEA Section 102(2) call-identifying information contravenes the statute and the Court's decision. The Commission's *Chevron* step-two interpretation of Section 102(2) must be consistent with CALEA's language, statutory scheme and legislative history. DOJ/FBI's interpretation fails to meet this standard. The Commission must reject DOJ/FBI's presumption that all information received from a traditional pen register must be collected and provided to law enforcement. This presumption contravenes CALEA's legislative history, which describes Congress' intent in defining "call-identifying information" and requires that CALEA be narrowly interpreted. Moreover, in the wireless context law enforcement has *not* traditionally had access to information beyond call routing data. The fact that law enforcement may have had access to non-call-identifying information in the past does not render it "call-identifying information" for purposes of Section 102(2). Finally, DOJ/FBI's strained, overbroad interpretation of the constituent terms of Section 102(2) should be rejected, as it would unlawfully expand the scope of Section 103.

DOJ/FBI have failed to demonstrate that any of the individual punch list items involve the provision of Section 102(2) call-identifying information. DOJ/FBI also have failed to demonstrate that the punch list items otherwise comply with CALEA's prerequisites.

- ***Post-cut-through dialing*** digits are not necessarily used for call-identification, as DOJ/FBI concede. Even where such digits are used to route interexchange calls, such digits are used only by the local serving carrier, wireless or wireline, to route calls in their own "equipment, facilities, or services." Accordingly, such digits are not call-identifying information. Rather, such digits are simply call content. Such information is not reasonably available to carriers, and cannot be provided to law enforcement, absent a Title III intercept order, consistent with CALEA's privacy protections.

- ***Subject-initiated dialing and signaling*** information also is not call-identifying information, and the fact that law enforcement may have had access to such information in the past does not change this conclusion. Such information has *not* traditionally been available in the wireless context. DOJ/FBI rely on an overly broad interpretation of Section 102(2), contrary to Congress' requirement that CALEA be interpreted narrowly.

- ***Party hold/join/drop information*** also is not call-identifying information, contrary to DOJ/FBI's overbroad interpretation of the terms "direction" and "each communication" in Section 102(2). The record demonstrates that such information has no relevance to the routing of communication through a carrier's network.

- ***In-band and out-of-band signaling*** information also is not call-identifying information, and the fact that law enforcement may have had access to such information in the past does not change this conclusion. Law enforcement's access to this information via the "local loop" is inapplicable to wireless carriers, to whom such information is simply call content. Such information is unrelated to call routing and not reasonably available.

Finally, the DOJ/FBI cost estimates do not demonstrate that imposition of the punch list items is consistent with CALEA Sections 107(b)(1) and (3). DOJ/FBI's interpretation of these statutory provisions would render compliance with Section 107(b) precatory and eviscerate Congress' intent that carriers not be obligated to retrieve every conceivable piece of call-identifying information transmitted throughout the public switched network. Moreover, DOJ/FBI's cost estimates do not include estimates from two significant wireless switch vendors, fail to account for necessary hardware upgrades, fail to address necessary capacity costs, and substantially overstate the significance of possible upcoming appropriations for CALEA reimbursement.

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To: The Commission

REPLY COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC ("Cingular"), by its attorneys, hereby replies to comments submitted in response to the *Public Notice* in the above-referenced proceeding.[1] Cingular primarily addresses herein the comments submitted by the U.S. Department of Justice and Federal Bureau of Investigation ("DOJ/FBI").[2] As Cingular and other parties demonstrated in their comments, the Communications Assistance for Law Enforcement Act ("CALEA") does not require, and the Commission may not impose, the four "punch list" capabilities adopted in the *Third Report and Order* and vacated by the U.S. Court of Appeals for the District of Columbia Circuit.[3] The record in this proceeding does not justify reimposition of those punch list capabilities.

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[1] *See* Public Notice, CC Docket No. 97-213, DA 00-2342 (rel. Oct. 17, 2000).

[2] Remand Comments of Department of Justice and Federal Bureau of Investigation in CC Docket No. 97-213, filed November 16, 2000 ("DOJ/FBI Comments").

[3] *See Communications Assistance for Law Enforcement Act, Third Report and Order*, 14 F.C.C.R. 16,794 (1999) ("*Third Report and Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 227 F.3d 450 (D.C. Cir. 2000).

DISCUSSION

I. THE RECORD IN THIS PROCEEDING DEMONSTRATES THAT THE COMMISSION MAY NOT IMPOSE ON CARRIERS THE FOUR PUNCH LIST CAPABILITIES

CALEA's statutory framework, as the Court affirmed, requires that the Commission first determine that the J-Standard is deficient before imposing the additional punch list capabilities.[4] The record clearly demonstrates that the J-Standard's definition of call-identifying information, and the exclusion of the punch list items, is consistent with CALEA's statutory language and legislative history.[5] The Court determined that the Commission may not modify the J-Standard without first identifying its deficiencies.[6] Because the J-Standard is not deficient, this should be the end of the matter.[7]

The comments demonstrate conclusively that *none* of the four punch list capabilities involves the provision to law enforcement of "call-identifying information."[8] Moreover, Cingular and numerous commenters also demonstrated that, even if the punch list items were to involve call-identifying information, the Commission could not impose those requirements on carriers unless the capabilities satisfy important statutory prerequisites of Sections 103 and 107.[9] Each punch list capability fails to meet one or more of the requirements that it: (i) involve *reasonably available* call-

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[4]*See USTA v. FCC*, 227 F.3d at 460-61; Cingular Comments at 2-4; AT&T at 5-6; PCIA at 4-5; TIA at 5-6; USTA at 3; Verizon at 2.

[5]Cingular at 4-6; AT&T at 3-6; BellSouth at 7-9; Center for Democracy and Technology ("CDT") at 3; PCIA at 5-6; Rural Cellular Ass'n at 3-4; TIA at 5-6; USTA at 3-6.

[6]*See USTA v. FCC*, 227 F.3d at 460-61.

[7]*See* CTIA at 2.

[8]*See* 47 U.S.C. § 1001(2); Cingular at 6-10; BellSouth at 10-19; PCIA at 7-8; Verizon at 3-4.

[9]Cingular at 4-6; BellSouth at 3-4, 9.

identifying information;[10] (ii) be *cost-effective*;[11] (iii) minimize the cost to *residential ratepayers*;[12] and (iv) "protect the *privacy and security* of communications not authorized to be intercepted."[13] For these reasons also, the Commission may not modify the J-Standard.

II. THE DOJ/FBI INTERPRETATION OF CALL-IDENTIFYING INFORMATION IS CONTRARY TO CALEA AND THE COURT'S DECISION

The Court has required the Commission, if it requires any of the punch list capabilities, to explain how it exercises its discretion to interpret "call-identifying information" in a manner sufficient to enable a court "to conclude that [the agency's] action [is] the product of reasoned decisionmaking."[14] The Commission's "*Chevron* step-two"[15] discretion to interpret this statutory definition is not unrestricted, but must be consistent with CALEA's language, statutory scheme and legislative history.[16] Under *Chevron* step two, the Commission must consider the statutory text,

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[10]BellSouth at 15-19 (party hold/join/drop, subject-initiated dialing, and in- and out-of-band signaling); PCIA at 8-9 (post-cut-through dialing).

[11]AT&T at 11-13 (post-cut-through dialing); BellSouth at 10, 15 (post-cut-through dialing, party hold/join/drop); PCIA at 10 (post-cut-through dialing); USTA at 7 (party hold/join/drop).

[12]PCIA at 9 (post-cut-through dialing).

[13]AT&T at 6-10 (post-cut-through dialing); BellSouth at 11 (same); CDT at 6-8 (same); CTIA at 18-21 (same); PCIA at 10-11 (same).

[14]*USTA v. FCC*, 227 F.3d at 460 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 52 (1983) and *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995)).

[15]*See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

[16]*See Troy Corp. v. Browner*, 120 F.3d 277, 285 (D.C. Cir. 1997) (noting that an agency's interpretation must be "reasonable and consistent with the statutory purpose"); *City of Cleveland v. U.S. Nuclear Regulatory Comm'n*, 68 F.3d 1361, 1367 (D.C. Cir. 1995) (providing that an agency's interpretation must be "reasonable and consistent with the statutory scheme and legislative history").

history, and purpose to determine whether these permit the interpretation advocated by DOJ/FBI.[17] DOJ/FBI's interpretation of call-identifying information fails to meet the standard set forth by the court and should be rejected.

A. The Commission Must Reject DOJ/FBI's Presumption that All Information Received from a Traditional Pen Register Must Be Collected and Provided

The statutory structure of CALEA does not support DOJ/FBI's assertion that "the Commission should adopt a presumption that 'call-identifying information includes information that law enforcement has traditionally been able to receive through authorized electronic surveillance in the POTS environment'" via pen register and trap-and-trace surveillance.[18] As the Court stated, "[t]he Commission's failure to explain its reasoning" in the *Third Report and Order* was "particularly serious *in view of CALEA's unique structure.*"[19] The only "presumption" with respect to Section 103 compliance manifest in the statutory language is the Section 107 safe harbor presumption that a carrier's compliance with an applicable industry standard (here, the J-Standard) would constitute compliance, absent a demonstration that such standard is "deficient." To override this presumption, the Commission must first identify the specific deficiencies in the J-Standard's definition of call-identifying information.[20] There are no deficiencies, however, and the Commission thus may not modify the J-Standard by mandating imposition of any of the punch list capabilities.

Moreover, the legislative history on which DOJ/FBI rely is notably juxtaposed with a congressional admonition that industry, the Commission, and law enforcement should interpret

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[17]*See Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

[18]DOJ/FBI at 10 (citing H.R. Rep. No. 103-827, at 22 (1994) ("House Report")).

[19]*USTA v. FCC*, 227 F.3d at 460 (emphasis added).

[20]Cingular at 3.

Section 103 narrowly.[21] Indeed, the legislative history states that "*[t]he Committee urges against overbroad interpretation of the requirements*" immediately after stating that Mr. Freeh, "[t]he FBI Director, testified that the legislation was intended to preserve the status quo, that it was intended to provide law enforcement no more and no less access to information than it had in the past."[22] From this, it is clear that Congress did *not* intend that law enforcement be provided broad access to all information it might have obtained from a traditional pen register. In short, the Commission must initiate its analysis of the J-Standard with a narrow interpretation of "call identifying information" premised on the relevant provisions of the statute and the legislative history.

DOJ/FBI also fail to acknowledge that the relevant legislative history discussing each of Section 103's requirements references not just "information" generically, but "call identifying information" in particular.[23] DOJ/FBI would utilize its broad interpretation of the Section 102(2) definition of call-identifying information to render meaningless a narrow interpretation of Section 103's capability requirements. Indeed, DOJ/FBI would include in their broad definition information that is not even used, collected, or maintained by the carrier for the origination, termination, or routing of calls.

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[21]DOJ/FBI cross-reference their original June 12, 1998 comments in this proceeding. In that filing, however, DOJ/FBI rely on the similarly selective reading of the legislative history. *See* DOJ/FBI Reply Comments, filed June 12, 1998 at 30 ("June 12, 1998 Comments").

[22]House Report at 22-23.

[23]*Id.* at 22 (stating that government must be able "to access reasonably available call identifying information"; discussing "[c]all identifying information obtained pursuant to pen register and trap and trace orders"; discussing making "call identifying information available to government").

Finally, DOJ/FBI cross reference their earlier comments, which are also premised on their flawed presumption.[24] DOJ/FBI essentially restate the same arguments made earlier -- that information on a carrier's network should be deemed call-identifying if law enforcement says it could conceivably have any connection with making a call, even over another carrier's facilities. This ignores the fact that dialing or signaling information only constitutes *call-identifying* information if it "identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber *by means of any equipment, facility, or service of a telecommunications carrier.*"[25] If particular dialing or signaling information is *not* used by a carrier to perform such identification, that information is not call-identifying information that the carrier must be capable of delivering under the express language of CALEA. If the carrier does not use a particular category of dialing or signaling information for call identification at all, the fact that another carrier, such as an interexchange carrier, may ultimately use such information for call identification does not change this conclusion. Simply put, if a carrier does not use such information for call identification, there is no way for the carrier to distinguish the particular dialing or signaling information that is in fact used by another carrier from other call content.

Importantly, in the wireless context, law enforcement has "traditionally" had access only to the call routing data sent to the mobile switching center ("MSC") when the subscriber presses

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[24]June 12, 1998 Comments at 30-33. In that filing, DOJ/FBI discuss the legislative history of the definition of call-identifying information. The original term, "call setup information," included information identifying "the origin and destination of a wire or electronic communication placed to, or received by, the facility or service that is the subject of the court order or lawful authorization, *including information associated with any telecommunication system dialing or calling features or services.*" *Id.* at 31 (emphasis added). Cingular submits that, if anything, Congress' rejection of the arguably open-ended scope of the italicized language further supports the narrow interpretation reflected in the J-Standard.

[25]47 U.S.C. § 1001(2) (emphasis added).

<SEND>. This information is analogous to the dialing pulses or DTMF tones sent over a wireline local loop to place a call. For wireless calls, however, there is no "local loop"; instead, the digits are sent as part of a call-setup data stream prior to assignment of a voice channel. The carrier uses this data to process the call, so it constitutes call-identifying information. No audio tones are used, and no DTMF digits need to be decoded. Therefore, wireless carriers do not need DTMF decoders to provide the dialed digits that genuinely constitute call-identifying information.[26] Wireline carriers, on the other hand, have traditionally provided the dialed digits via a pen register physically connected to an audio tap on the loop, because the tones are sent "in-band" as audio tones on the local loop. In some cases, the pen register might also have displayed digits *not* used for call placement if an audio tap were left in place after call set up, but that does *not* mean that all such tones constitute call-identifying information.

The fact that law enforcement may have traditionally had access to post-cut-through dialed digits via wireline pen register intercepts does not necessarily render such digits call-identifying information -- a fact which DOJ/FBI concedes[27] -- and the fact that the application of the definition of call-identifying definition may result in *additional* privacy protections for wireline subscribers does not render the J-Standard deficient.[28] Contrary to DOJ/FBI's assertion, it is *not* "undisputed that, at the very least, CALEA was intended to ensure that law enforcement does not receive *less* information than it did in the POTS environment."[29] Rather, CALEA ensures that law enforcement

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[26]*See* CTIA at 21.

[27]DOJ/FBI at 11; June 12, 1998 Comments at 30.

[28]*See USTA v. FCC*, 227 F.3d at 462 ("any privacy protections burden law enforcement to some extent").

[29]DOJ/FBI at 10 (emphasis in original).

has access only to information that constitutes call-identifying information via a pen register intercept. Thus, CALEA preserves law enforcement's access *not* to all information that might have been received in the POTS environment, but only to call-identifying information and, as discussed in Cingular's comments and *infra*, even call-identifying information need not be provided to law enforcement unless certain statutory prerequisites are met.

B. The Commission Should Reject DOJ/FBI's Interpretation of Section 102(2)

DOJ/FBI next discuss each of the constituent terms in the definition of call-identifying information, and conclude that while the Commission must "explain how it has construed and applied 'call-identifying information' and its constituent terms, [it] is under no obligation to announce an all-encompassing definition . . . that goes beyond the confines of this proceeding to address and resolve all potential applications of the statutory terms."[30] DOJ/FBI's parsing of those constituent terms, however, does little to elucidate how call-identifying information includes more than telephone numbers.[31] For example, DOJ/FBI assert that "'call identifying information' includes *all* 'dialing and signaling information' that identifies the origin, direction, destination or termination of communications, not just telephone numbers." DOJ/FBI also assert that "identifies" includes "more than one kind of dialing or signaling information."[32] In both instances, DOJ/FBI simply assume, without elaboration, that call-identifying information necessarily includes more than telephone numbers.

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[30] *Id.* at 12-18.

[31] *See National Wildlife Federation v. Hodel*, 839 F.2d 694, 764 (D.C. Cir. 1988) ("the very articulation of such an interpretation suggests how strained it is").

[32] DOJ/FBI at 13.

DOJ/FBI next assert that "guidance regarding the meaning" of the terms in the Section 102(2) definition can be derived from Section 103(a)'s reference to "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications."[33] DOJ/FBI draw the wrong conclusion, however, as to how Section 103(a) guides the interpretation of Section 102(2), however. What *is* clear is that the term "a telecommunications carrier" in Section 102(2) must be read to mean the particular carrier whose facilities are used "to originate, terminate, or direct communications," because Section 103(a) imposes capability requirements *on that carrier*.[34] In other words, Section 103(a) makes clear that dialing and signaling information can only be considered call-identifying information that a carrier must provide to law enforcement if it is information used by that carrier's facilities to originate, terminate, or direct communications. If the carrier's facilities do not use the dialing or signaling information in this way, Section 103(a) does not require that carrier to make it available.

DOJ/FBI, on the other hand, interpret Section 103(a) to expand the definition of call-identifying information by including therein *all* information that identifies "the use of" equipment, facilities or services to originate, terminate, or control the path or course of communications.[35] There is no support for the DOJ/FBI position in the text of the statute, however, and it plainly is contrary to Congress' admonition that these statutory provisions be narrowly interpreted.[36] Indeed, it is

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[33] *Id.* at 14.

[34] *See* CTIA at 14 ("the entirety of JSTD-025 is written from the perspective of the subject's assessing carrier").

[35] *See* DOJ/FBI at 14.

[36] *See* House Report at 22; *see also* Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 47.07 (6th Ed. 2000) at 232-33 ("[a] definition which declares what a term means . . . excludes any meaning that is not stated").

unclear even how this interpretation is consistent with DOJ/FBI's own acknowledgment that it is not entitled to any *more* information than it obtained in the POTS environment. In the POTS environment, law enforcement would *not* be entitled under a pen register intercept authorization to receive information not carried as audio tones on the local loop. A narrow interpretation of the definition, consistent with that of the J-Standard is required.[37] Again, the Commission should reject DOJ/FBI's efforts to expand the scope of Section 103 by broadly interpreting its defined terms.[38]

Finally, no party is asking that the Commission "resolve all potential applications of the statutory terms." The only issue here involving application of the statutory definition of call-identifying information is whether the J-Standard definition of call-identifying information is *deficient*. As discussed in Cingular's comments, the J-Standard definition is consistent with CALEA and not deficient.

III. DOJ/FBI FAIL TO SHOW THAT ANY INDIVIDUAL PUNCH LIST ITEMS MEET CALEA'S REQUIREMENTS

As Cingular demonstrated in its comments, "before imposing any of the punch list capabilities, the Commission must, in each case, find that the item under consideration constitutes call-identifying information, explain why that is the case, and account for all of [the] statutory prerequisites."[39] DOJ/FBI have provided no basis for the Commission to impose any one of the punch list items on carriers.

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[37]*See United States v. Labonte*, 70 F.3d 1396, 1404 n.8 (1st Cir. 1995) (even "[p]lausible if strained interpretations of a series of individual statutory terms might at times lead to an impermissible overall interpretation of a statute").

[38]As discussed in Section III.C *infra*, the Commission must also reject DOJ/FBI's broad interpretation of the Section 102(2) term "each communication."

[39]Cingular at 5-6.

A. Post-Cut-Through Dialing

DOJ/FBI has long acknowledged that post-cut-through digits are dialed for purposes other than call completion and do not necessarily represent the number of a called party and, in such circumstances, do not constitute call-identifying information.[40] Indeed, DOJ/FBI do not even claim that a subject's local serving carrier (whether wireline or wireless) actually uses post-cut-through dialed digits to originate, terminate, direct, or route calls.[41] DOJ/FBI maintain, however, that because post-cut-through digits may be used, in some cases, by the customer to direct the placement of calls on *another* carrier's facilities, such digits constitute call-identifying information. As discussed above, this does not make such digits call-identifying information with respect to a carrier that does not use the digits in its "equipment, facilities or services" to originate, terminate, direct or route communications.[42]

While post-cut-through digits would appear not to be call-identifying information with respect to the local wireline serving carrier generally, this is emphatically the case with respect to wireless carriers. As Cingular discussed in its comments, for wireless carriers, dialed-digit tones are not used for any of the functions within the definition of call-identifying information, either pre- or post-cut-through. DOJ/FBI apparently would dismiss this argument on the basis that as long as such tones "'identify the origin, direction, destination, or termination' of a 'communication generated or received by a subscriber,' it is 'call-identifying information' -- period."[43] A wireless carrier's facilities, however, do not use post-cut-through dialed digits for directing, originating or receiving

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[40]June 12, 1998 Comments at 39.

[41]Local wireline carriers use *pre*-cut-through digits to route calls.

[42]*See* 47 U.S.C. § 1001(2); CTIA at 13.

[43]DOJ/FBI at 21.

calls.[44] For a wireless carrier such tones are always call content, pure and simple. Cingular submits that, call-identifying information must be interpreted narrowly to exclude, at an absolute minimum, call content.[45]

Dialed digits on a wireless system are call content, just as spoken words are call content. Both can be used to place calls after connecting to another carrier, and both can be used to communicate information. A wireless carrier cannot distinguish between a telephone number dialed after connecting to an interexchange carrier and a PIN, account number, or menu selection. Likewise, the wireless carrier cannot distinguish between a telephone number spoken to an interexchange carrier operator or voice-response unit, and a conversation or a message left in voice mail. To the serving wireless carrier, all of these are purely content.[46]

This punch list item also contravenes CALEA's requirements that the call-identifying information at issue be "reasonably available" to the wireless carrier and that cost and privacy concerns be adequately addressed.[47] For wireless carriers, dialed digit tones are not reasonably available, because wireless carriers have no reason to detect and extract such tones. Moreover, DOJ/FBI acknowledge that there is no "currently available technology that permits an originating

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[44]CDT at 4-6.

[45]*See USTA v. FCC*, 227 F.3d at 450 ("[a]lthough the Commission appears to have interpreted the J-Standard as expanding the authority of law enforcement to obtain the contents of communications, . . . the Commission was simply mistaken" because such information must be obtained only "'pursuant to a court order or other lawful authorization.'").

[46]It is noteworthy that DOJ/FBI have *not* argued that the J-Standard be amended to require carriers to provide voice messages as call-identifying information merely because they may include telephone numbers spoken to an interexchange carrier.

[47]Cingular at 6-8.

carrier to limit dialed digit extraction to digits that are dialed for call routing purposes."[48] Thus, by its own admission, DOJ/FBI face a significant hurdle in meeting these requirements. The only way that a carrier could supply dialed digits that *are* used for placing calls would be to turn over *all* dialed digits, including those that DOJ/FBI concede are call content.

DOJ/FBI's attempt to account for CALEA's privacy requirements is unavailing.[49] DOJ/FBI rely on 18 U.S.C. § 3121(c), adopted in CALEA, to support its conclusion that law enforcement agencies may "'use, when reasonably available, technology that restricts the information captured' to call processing information."[50] Armed with this statutory provision, DOJ/FBI states that "while carriers must have the *capability* to perform dialed digit extraction, no carrier is required to *deliver* post-cut-through digits in the absence of appropriate legal authorization," and carriers can be required "to have the capability to 'turn off' dialed digit extraction in pen register cases if and when a court determines that the pen register statute does not provide sufficient legal authority for the carrier to use this capability."[51] In fact, DOJ/FBI are unable to cite a single case holding that post-cut-through dialed digits are *ever* deemed to be call-identifying information that must be delivered under a pen register authorization, much less requiring delivery of digits without knowing whether they are content or call-identifying information.

DOJ/FBI do not even attempt to reconcile their insistence that carriers must have the ability to perform dialed digit extraction with their concession that no technology is available to separate

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[48]DOJ/FBI at 20.

[49]As CTIA explains, this provision of CALEA was "intended to be a transitional section" that left in place the "New York rule." *See* CTIA at 20-21 (*citing People v. Bialostok*, 80 N.Y.2d 738 (1993), *mot. denied*, 81 N.Y.2d 995 (1993)).

[50]DOJ/FBI at 49-50 (citing House Report at 32).

[51]*Id.* at 51 (emphasis in original).

the alleged call-identifying digits from other dialed digits. Apparently, they plan to rely on vaguely-worded pen register authorizations to force delivery of *all* dialed digits once carriers can extract them.

Finally, the Center for Democracy and Technology points out that the DOJ/FBI approach raises significant Fourth Amendment concerns.[52] Cingular respectfully submits that the Commission must find that a particular punch list item must *actually*, not speculatively, address CALEA's privacy concerns. Simply wishing that CALEA's privacy concerns could be addressed, as DOJ/FBI have essentially done, is insufficient. If particular dialed digits are deemed call-identifying information, while others are not, carriers cannot be required to extract and provide *all* dialed digits. If the particular class of dialed digits is not reasonably available to the carriers without including other numbers that are purely call content, the carrier may not provide *all* dialed digits in response to a pen register authorization.[53]

B. Subject-Initiated Dialing and Signaling

DOJ/FBI contend that "[t]o the extent that these services have been available in the POTS environment, law enforcement has always had access to the subject-initiated dialing and signaling activity associated with them."[54] This contention presupposes, however, that all such information is "call-identifying information." As Cingular noted in its comments, pen registers at most capture

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[52]"The fact that the government has the lesser degree of authority needed to intrude on areas not protected by the Fourth Amendment does not give it the authority to also intrude on areas protected by the Fourth Amendment, even if it agrees not to use any of the protected information." CDT at 5-6 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), *Brown v. Waddel*, 50 F.3d 285 (4th Cir. 1995)).

[53]*See USTA v. FCC*, 227 F.3d at 465 (Commission may not "require carriers to provide the government with information that is 'not authorized to be intercepted'").

[54]DOJ/FBI at 23-24.

the transmission of tones used for such services and features, but do not identify the effects of such tones, such as the direction or destination of a call.[55] Moreover, and as discussed *supra*, DOJ/FBI's reliance on its broad interpretation of "direction" as "encompassing the subject's activities in directing communications"[56] contravenes Congress' mandate that Section 103 be narrowly interpreted and, in any event, fails to address the necessary switch modification changes.[57] The Commission must reject this punch list capability as well.

C. Party Hold/Join/Drop

DOJ/FBI concede that "some (although not all) of the information in question was unavailable to law enforcement in the POTS environment." While DOJ/FBI for once attempt to corral this capability solely into the definition of call-identifying information, they rely on an overbroad interpretation of what constitutes the "direction" of a communication. It is not the "*subject's* 'direction' of each communication"[58] that is relevant for purposes of Section 102(2), but the direction of the communications for purposes of routing of the call through the carrier's

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[55]Cingular at 9; *see also* CDT at 10-11.

[56]DOJ/FBI at 24.

[57]*See* Cingular Comments at 9, n.35; CTIA at 15 ("the initial call does not terminate when a party temporarily switches to another"). DOJ/FBI also reference earlier-filed comments in which DOJ/FBI asserted that the J-Standard "is not faithful to the law enforcement objectives of CALEA" by resulting in a loss of information, and that such information "traditionally has been accessible to law enforcement over the local loop." June 18, 1998 Reply Comments at 45-47. As discussed *supra*, such information is not necessarily "call identifying information" and, moreover, wireless carriers have *not* traditionally provided such information, as there is no "local loop" to access. The wireless voice channel, unlike a local loop, does not carry audio tones used to make or direct the progress of calls.

[58]DOJ/FBI at 28 (emphasis added).

network.[59] The record demonstrates that such information has no relevance to the routing of communications through a carrier's network.

Moreover, DOJ/FBI rely on an overbroad interpretation of the term "each communication" in Section 102(2). A carrier's network does not treat the type of "communications" that DOJ/FBI describe in their comments as anything more than a single "call" or "communication" by the subject of the intercept.[60] (Indeed, DOJ/FBI later describe such "communications" as "the call.") [61] DOJ/FBI's broad interpretation of the "each communication" provision of Section 102(2) is contrary to common understanding of the term and should be rejected.

D. In-Band and Out-of-Band Signaling Information

DOJ/FBI assert that "[t]his kind of network-generated signaling activity has traditionally been available through electronic surveillance on the 'local loop' between the carrier and the subject."[62] As discussed above, however, law enforcement's "local loop" access is inapplicable to wireless carriers. For wireless carriers, "ringing and busy signals on outgoing call attempts" are simply call content.[63] As noted in Cingular's comments, most of these tones are unrelated to call routing and cannot be detected from the network or the originating or terminating switches and are not reasonably available. DOJ/FBI's reference to Sections 5.4.8 and 5.4.10 of the J-Standard is unavailing; the referenced J-Standard provisions for release message and termination attempt

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[59] *See* House Report at 21.

[60] *See* USTA at 7 ("once a conference call is established, the origin, direction, destination and termination of that call are fixed"); CDT at 8-9; CTIA at 16.

[61] DOJ/FBI at 28.

[62] *Id.* at 26.

[63] *See* CDT at 9-10.

message relate to information available in the switch, and thus readily available to the carrier.[64] The Commission must reject this punch list capability as well.

IV. THE DOJ/FBI COST ESTIMATES DO NOT ADDRESS THE PREREQUISITES OF CALEA SECTION 107(B)

A. DOJ/FBI's Application of Section 107(b)(1) and (b)(3) Is Contrary to CALEA and the Court's Decision

As Cingular discussed in its comments, even assuming *arguendo* that some of the punch list capabilities involve call-identifying information, each item must meet the cost-effectiveness requirements of Section 107.[65] DOJ/FBI's interpretation, however, would eviscerate the cost-effectiveness requirement of Section 107(b)(1). Section 107(b)(1) authorizes "the Commission to establish, by rule, technical requirements or standards that . . . meet the assistance capability requirements of Section 103 by cost-effective methods." DOJ/FBI further assert that the purpose of Section 107(b) "is not to decide *whether* carriers must comply with the assistance capability requirements of Section 103, but instead to decide *how* they are to comply."[66]

This interpretation would effectively render the prerequisites of Section 107(b) precatory rather than mandatory. Moreover, by dismissing as inadequate the Commission's conclusory explanations of cost-effectiveness and the impact of the punch list capabilities on residential ratepayers, the Court dispelled any purported "presuppos[ition] that any technical standards adopted by the Commission will 'meet' the requirements of Section 103 and ensure 'compliance' with those

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[64] *See also* CTIA Comments at 17-18.

[65] Cingular at 5.

[66] DOJ/FBI Comments at 44.

requirements."[67] The language and structure of Sections 103 and 107 demonstrate Congress' express determination that carriers need not be obligated to retrieve every conceivable piece of call-identifying information transmitted throughout the public switched network, and the Commission must not second-guess that judgment by embracing the DOJ/FBI interpretation.[68]

B. DOJ/FBI's Cost Estimates Understate Carrier Costs and Overstate the Significance of Carrier Reimbursement

DOJ/FBI provide cost figures for switch platforms based on cooperative agreements between law enforcement and four major switch manufacturers which purportedly cover "approximately 85 percent of the wireline and wireless switches currently in use in the United States."[69] Conspicuously absent from this list is one of Cingular's primary switch vendors, Ericsson, as well as Motorola. These are two of the leading providers of wireless switches. Thus, it appears that the DOJ/FBI cost estimates account for only about 50 percent of wireless switches, based on an approximation of these two companies' market shares. Accordingly, DOJ/FBI greatly understate the costs.

Moreover, these figures appear to be based solely on "*software* solutions for these platforms." There is no discussion, however, of necessary hardware (for example, the ComVerse hardware used to convert the output data from the Ericsson switch into the CALEA-defined format and then deliver it to the appropriate law enforcement agency) or of software upgrades that may be necessary for equipment other than the switch, such as the HLR. In addition, there is no discussion of the cost of providing interception capacity.[70]

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[67] *USTA v. FCC*, 227 F.3d at 461; DOJ/FBI at 44.

[68] *See* CTIA Comments at 3 (Section 107(b) is "a checklist, not an optional list of factors to be considered and balanced").

[69] DOJ/FBI at 38-39.

[70] *See* CTIA at 24 (noting it is uncertain which costs are covered by FBI-proposed "buyout").

DOJ/FBI also make much of the anticipated upcoming $500 million appropriation for CALEA reimbursement, but these monies must be utilized nationwide for both capability *and* capacity. This sum will be insufficient to cover capability costs alone, given that the DOJ/FBI estimates omit two of the largest wireless switch vendors. If there will not be sufficient funds to pay for carriers' cost of meeting any of the government's capacity requirements, much less many of the punch list capabilities, it is unreasonable to add these capability requirements.[71] In addition, to the extent that DOJ/FBI focus reimbursement efforts on pre-January 1, 1995 equipment and facilities, the compliance burden will primarily fall on new market entrants.

For these reasons, the DOJ/FBI-proffered $350 million estimate for the J-Standard and punch list capabilities, and the assurances that the cost of such solutions "is borne entirely by the federal government" provides little comfort for most wireless carriers.[72] If anything, the DOJ/FBI comments support the conclusion that compliance with the punch list capabilities is not cost-effective and will not minimize the cost of compliance to ratepayers, except to the extent that carriers are reimbursed for such costs.

CONCLUSION

For the foregoing reasons, the record in this proceeding supports Cingular's conclusion that the Commission should not and may not impose on carriers the four punch list capabilities remanded

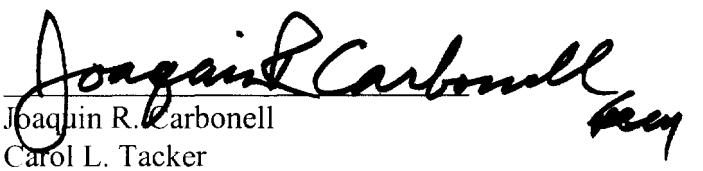
[71] Indeed, DOJ/FBI concede that much of the costs involved for dialed digit extraction are attributable to capacity requirements, and thus subject to reimbursement. *Id.* at 40.

[72] *Id.* at 39.

to the Commission. DOJ/FBI's arguments to the contrary are inconsistent with the CALEA's statutory structure and legislative history, as well as the Court's decision.

Respectfully submitted,

CINGULAR WIRELESS LLC

By: 

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